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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 IN RE: PHENYLPROPANOLAMINE
7 (PPA) PRODUCTS LIABILITY
8 LITIGATION,

MDL NO. 1407

9 ORDER GRANTING DEFEN-
10 DANTS' MOTION FOR SUMMARY
11 JUDGMENT

12 This document relates to:

13 *Johnson v. Bayer Corp.*, C02-
14 2156

15 Defendants Novartis Consumer Health, Inc., Novartis
16 Pharmaceuticals Corporation, and Novartis Corporation (collec-
17 tively "Novartis"), on behalf of themselves, Bayer Corporation,
18 SmithKline Beecham Corporation d/b/a/ GlaxoSmithKline, and
19 SmithKline Beecham Consumer Healthcare, L.P., (collectively
20 "defendants"), have filed a motion for summary judgment, assert-
21 ing that plaintiff Alma Johnson has failed to show that she took
22 any of defendants' PPA-containing products within 72 hours of her
23 stroke. Under this court's June 18, 2003 *Daubert* Order, of
24 course, such showing is required to establish a claim. See June
25 18, 2003 Order Granting in Part and Denying in Part MDL Defen-
26 dants' Motion to Preclude Plaintiffs' Expert Opinions as to
General Causation; see also, e.g., May 5, 2004 Order Granting in
Part and Denying in Part Defendants' Motion for Summary

ORDER

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1 Judgment.¹

2 Counsel for Johnson have filed an opposition to this motion,
3 claiming that defendants have used selective portions of John-
4 son's deposition in support of their motion, and have "completely
5 disregarded the plaintiff's pleadings, fact sheets, answers to
6 interrogatories, and responses to requests for admissions."
7 Plaintiff's Opposition at 2. The crux of plaintiff's "argument"
8 is contained in the following paragraph:

9 Defendants argue that plaintiff did not identify
10 Tavist-D, Alka-Selzter Plus, Contact 12 Hour, or Contac
11 Maximum Strength when questioned about medications she
12 took during the week prior to her stroke in August
13 2000. In fact, Defendants' [sic] have not provided any
14 deposition testimony that would confirm or deny plain-
15 tiff's ingestion of Contact 12 Hour and or Contac
16 Maximum Strength within 72 hours of her stroke. Con-
17 trarily, it is plaintiff's belief that any product she
18 ingested containing PPA may have caused or substan-
19 tially contributed to her injury within a reasonable
20 dose- and time-response. Therefore, a genuine issue of
21 material fact exists regarding ingestion, whether
22 within a 72 hours window or preceding such window, of a
23 PPA-containing product causing or substantially con-
24 tributing to the plaintiff's stroke.

18 *Id.* at 3. Plaintiff also accuses defendants of "ignoring" Fed.
19 R. Civ. P. 56(c), insofar as they have "failed" to consider "all
20 of plaintiff's pleadings." In particular, plaintiff would have
21 the court examine the allegations contained in plaintiff's fact
22 sheet and plaintiff's complaint.

24 ¹Plaintiff attempts to re-litigate the question of whether
25 failure to establish general causation is fatal to plaintiff's
26 claim. See Plaintiff's Opposition at 4. That matter has been
determined and will not be reexamined here.

1 Contrary to plaintiff's bald and misleading assertion,
2 defendants' motion is rife with citation to pleadings and deposi-
3 tion testimony "denying" that plaintiff ingested any of defen-
4 dants' PPA-containing products within 72 hours of her stroke.
5 See Motion for Summary Judgment at 2-4. Moreover, as counsel
6 well know, it is plaintiff's burden, not defendants', to "con-
7 firm" the existence of an essential element of plaintiff's claim,
8 either on summary judgment or at trial. Her *belief* as to the
9 cause of her stroke is, at this stage, utterly irrelevant to this
10 analysis. Finally, plaintiff's apparent request that the court
11 take into consideration *allegations* contained in plaintiff's fact
12 sheet and complaint, when it is her burden at this point to
13 produce actual evidence, is nothing short of incredible, in both
14 the traditional and contemporary senses of the word.

15 Presumably plaintiff's counsel calculated that filing any
16 opposition, despite an absence of evidence or argument, might
17 persuade an unwary court to deny defendants' motion as "case-
18 specific." The court hereby admonishes counsel that in the
19 future, however, any brief containing this degree of frivolity
20 will be subject to Rule 11 sanctions.

21 Defendants having demonstrated that there is no genuine
22 issue of material fact left in this case, the motion for summary
23 judgment is hereby GRANTED, and those defendants party to this
24 motion are DISMISSED.

25 DATED at Seattle, Washington this 16th day of December,
26 2004.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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